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No. 617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WALTER R. HEARNE and STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

Reply To Second Motion To Dismiss

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The Appellants herein herewith reply to the Motion to Dismiss of Appellees filed in March, 1965, and as grounds in opposition thereto state that the said Motion does not comply with the Rules of this Court, that the same was prematurely filed, and does not set forth any grounds upon which relief may be granted.

Argument

The Motion does not comply with Rule 16 of this Court. It is not timely filed within thirty (30) days of the Jurisdictional Statement, which was filed October 26, 1964. It is not based on the grounds allowed in said Rule. The Second Motion to Dismiss also must be considered within the facts that the Appellants waived their reply to the first Motion to Dismiss and this Court entered its Order of February 1, 1965, continuing this cause on the docket until the Court Conference of May 21, 1965. By said Order, a request for report on reapportionment in Idaho was made, and the present Motion to Dismiss by the named Appellees makes no report on reapportionment other than to note the passage of statutory amendments by the Idaho Legislature without description of the same.

The basis of the Motion is in error. It alleges that as the time in the original Stay Order is about to expire, the appeal herein should be dismissed. Even if Appellee's interpretation of the Stay Order, that it automatically expires as of April 17, 1965, is correct, the

Motion is improperly taken until such time. However, a reading of the Stay Order does not indicate that the Court will act on or at any particular date after April 17. The order very clearly indicates that the stay will continue until April 17 ". . . or until further order of the Court." This could be before or after April 17, requiring affirmative action of the three-judge statutory court. No such action is reported by said Motion, nor has it occurred.

The Motion is premature. The various amendments reportedly passed by the recent special session of the Legislature had not been enacted into law at the date of the filing of said Motion, the Governor not signing the same until April 2, 1964. It is premature on the ground noted above, that the Stay Order is still in effect.

The Motion to Dismiss is further without grounds upon which it can be granted, for the reason that there are presented in the appeal herein questions wholly apart from when, and if, the Stay Order expires. Recalling that this Court reversed and remanded from the Decision of January 10, 1963 of the three-judge statutory court, the Appeal notes the failure of such Court to comply with said mandate. The Appeal also notes in "Questions Presented" the refusal of the three-judge statutory court to take any affirmative action herein. Even if the three-judge statutory court was justified in withholding the granting of equitable relief because of elections in the fall of 1964, its failure

to grant declaratory relief prayed for is not so excused. A declaration of the rights of appellants under the Fourteenth Amendment and establishment of guidelines was required, and the appeal raises the issue of the failure of the court below to so act. Finally, questions presented include the issues as to the 1911 Amendment to the Idaho Constitution, and as to failing to make any decision as to the Special Session in August, 1964, held for general business five days after the hearing upon which the Stay Order was given. It is obvious that many of the questions presented are hardly moot. In addition to his motion to dismiss in this court, the appellee Attorney General has filed a motion to dismiss appellant's complaint in the lower court upon the grounds that the Idaho legislature has validly reapportioned itself. Said motion ignores the present state of the pleadings in this court, in which this court has in effect noted probable jurisdiction, thus removing the proceedings in their entirety from the jurisdiction of the lower court.

Conclusion

Reference is made to the Supplemental Brief of Appellants filed concurrently herewith, reporting in detail the failure of the Idaho Legislature to validly reapportion itself. Based on the above statements and those set forth in said Supplemental Brief, it is respectfully submitted that there are no grounds presented by the second Motion to Dismiss upon which any relief can be granted. As noted in the Conclusion to the Mo-

tion to Dismiss, it in effect is a prayer for further Stay Order in hopes that after the lengthy proceedings herein, the three-judge statutory court may finally provide some relief for the appellant. As is pointed out in detail in the Supplemental Brief, appellants submit that without adequate directions from this Court, such relief will continue to be delayed.

Respectfully submitted,

McDEVITT & McDEVITT

By:

A Member of the Firm
Attorneys for Appellants